No. 06-531

IN THE

Supreme Court of the United States

MICHAEL W. SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*,

Petitioners,

v.

T. A. WYNER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONERS

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February 26, 2007

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QUESTIONS PRESENTED

1. Whether a plaintiff who obtains a preliminary injunction, but no judgment on the merits or court-enforced consent decree, is a "prevailing party" under 42 U.S.C. § 1988.

2. Whether a plaintiff who obtains a preliminary injunction that is followed by denial of a permanent injunction and judgment on the merits for defendants is a "prevailing party" under 42 U.S.C. § 1988.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were then-petitioner David B. Struhs, in his official capacity as Secretary, Florida Department of Environmental Protection, and petitioner Terrence Coulliette, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park. Michael W. Sole is now the Secretary of the Department of Environmental Protection, and has been substituted for David B. Struhs as a petitioner. Plaintiffs below and respondents here are T. A. Wyner and George Simon.

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OPINIONS BELOW

The April 25, 2006 opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 179 Fed. App'x 566 (Pet. App. 1a-8a). The July 17, 2006 order of the court of appeals denying the petition for rehearing en banc is not reported (Pet. App. 49a-50a). The January 28, 2004 order and opinion of the District Court for the Southern District of Florida, granting summary judgment to defendants and finding that plaintiffs were prevailing parties, is not reported (Pet. App. 23a-48a). The February 13, 2003 order of the district court granting plaintiffs' motion for a preliminary injunction (as amended on February 27, 2003) is reported at 254 F. Supp. 2d 1297 (Pet. App. 9a-22a). The August 16, 2004 omnibus order of the district court granting in part plaintiffs' motion for attorney's fees and costs is not reported (Opposition Appendix ("Opp. App.") 1a-13a).

STATUTES INVOLVED

42 U.S.C. § 1988(b) provides in pertinent part:

> In any action or proceeding to enforce a provision of section . . . 1983 . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .

Florida Administrative Code Rule 62D-2.014(7)(b) provides as follows:

> In every area of a park including bathing areas no individual shall expose the human, male or female genitals, pubic area, the entire buttocks or female breast below the top of the nipple, with less than a fully opaque covering.

Florida Administrative Code Rule 62D-2.014(18) provides as follows:

> Free speech activities include, but are not limited to, public speaking, performances, distribution of printed

material, displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 25, 2006. Then-petitioner David B. Struhs, in his official capacity as Secretary, Florida Department of Environmental Protection, and petitioner Terrence Coulliette, in his official capacity as Park Manager of the John D. MacArthur Beach State Park, timely filed a petition for rehearing and rehearing en banc, which was denied on July 17, 2006.[1] Petitioners timely filed their petition for certiorari on October 16, 2006. This Court granted the petition on January 12, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

Respondents Wyner and Simon, plaintiffs below, are not prevailing parties eligible for attorney's fees under § 1988 because they never obtained a judgment on the merits or a court-enforced consent decree. See *Buckhannon Bd. & Care Home, Inc.* v. *W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603-604 (2001). To be a prevailing party, "[a]t a

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[1] Michael W. Sole is now the Secretary of the Department of Environmental Protection, and he has been substituted for David B. Struhs as a petitioner.

minimum, the plaintiff must be able to point to a *resolution* of the dispute which charges the legal relationship between itself and the defendant." *Tex. State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (emphasis supplied). The state law whose constitutionality respondents attacked remains valid and enforceable today. Yet the courts below awarded attorney's fees to plaintiffs. Under this Court's precedent, a plaintiff who obtains a preliminary injunction but no further relief cannot be deemed a "prevailing party," because a preliminary injunction does not constitute an adjudication on the merits or judicially-enforced relief that resolves the plaintiff's legal claim. At best, a preliminary injunction is a non-binding prediction of the outcome of the claim, made in order to prevent irreparable harm while the court adjudicates its merits. See *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 394-95 (1981). Due to the frequent haste and abbreviated procedures in preliminary-injunction proceedings, such orders lack preclusive effect and may be based on legal and factual error (as occurred here). Preliminary injunctions fall in the category of interim orders that touch on the merits, but do not confer prevailing-party status. See *Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987).

Assuming *arguendo* that some preliminary injunctions confer prevailing-party status, the preliminary injunction in this case cannot. The same court that issued the preliminary injunction ultimately reversed its tentative findings and conclusions in granting summary judgment to the state defendants. Plaintiffs cannot be prevailing parties based on a preliminary injunction whose legal and factual basis is later *rejected* by the same court on its merits. And, even if the summary-judgment decision had not made clear that the preliminary injunction was the result of an incomplete record, the injunction expired by its own terms and the legal claim underlying that injunction became moot. A preliminary injunction based on a legal claim that becomes moot before its adjudication is insufficient for prevailing-party status, at

least where, as here, the claim is mooted by the passage of time and *not* by the defendants' actions.

On each of these independent grounds, the court of appeals' decision should be reversed.

STATEMENT OF THE CASE

1. *Background.* This case arises from respondent T.A. Wyner's ("Wyner") interest in appearing nude in the John D. MacArthur Beach State Park in Palm Beach County, Florida ("MacArthur Park" or "Park"). The Park is owned by the State, and operated by a state agency, the Florida Department of Environmental Protection ("Department"). Thus, the Park is subject to the rules which govern all state parks set forth in Florida's Administrative Code. This includes Rule 2D-2.014(7)(b), which requires patrons of Florida's state parks to cover their genitals, pubic areas, portions of their buttocks and, for females, breasts (hereafter "Bathing Suit Rule" or "minimum-clothing requirement").

Since 1990, Wyner has sought to appear nude in MacArthur Park in performances and demonstrations. Respondent Simon has sought to observe Wyner's nude performances and demonstrations. Pet. App. 10a, 24a; Joint Appendix ("JA") 13. In 1991, Wyner began producing and performing at the Park a play called "MacArthur: The Man, the Beach, and the Skinny-Dippers," depicting the Park's history and the State's enforcement of the Bathing Suit Rule. Pet. App. 11a, 25a. Wyner and Simon were arrested for nudity while performing this play in 1991. Those charges were later dismissed. *Id.*

In 1995, Simon filed a civil action alleging that his constitutional rights had been violated by the 1991 arrest. Pet. App. 11a, 25a. On May 12, 1995, the State settled Simon's civil action by stipulation. That stipulation stated that "nudity coupled with expressive activity is generally protected by the First Amendment subject to reasonable restrictions on time, place, and manner." JA 22. Pursuant to

this Stipulation, the State allowed Wyner's MacArthur Park play to be presented on February 19, 1996, with "placement of a bolt of cloth in a semi-circle around the area where the play will be performed," and with signs "advising beachgoers that a play will be performed within the cloth-enclosed theater which includes nudity." *Id.* at 23. During the 1996 performance, however, the participants did *not* remain behind the screen. Pet. App. 4a, 42a.

In 1998, Wyner again conducted a performance of the play. On this occasion, the nude participants stayed behind the screen. Pet App. 26a; JA 49.

In 2001, Wyner sent to the MacArthur Park manager a request that she be permitted to produce and perform the play in the nude. Attorneys for the Department indicated that she could not do so, requiring that she comply with the Bathing Suit Rule. Wyner decided not to perform the play. JA 55-56 (citing Letter to Wyner from M. Levy, Ass't Gen. Counsel, Jan. 23, 2001.).

In mid-January 2003, Wyner called Park Manager Coulliette to inform him that she intended to engage in a demonstration on February 14, 2003, during the Winter Naturist Gathering in Palm Beach County. JA 16. This demonstration would include the production of a peace symbol composed of nude bodies at the Park. On January 29, Wyner put her plans in writing, and Couliette forwarded the written description to the Bureau Chief of the Parks for that District. *Id.* at 16, 24-25.

By letter dated February 6, Coulliette informed Wyner that although her "activities are welcome during any hours the Park is open," the Department had rejected her request that she be permitted to demonstrate *in the nude*. JA 29-30. The Department stated that it did "not believe that *the nudity* planned for your activities is expressive conduct protected by the First Amendment." *Id.* at 29. (emphasis supplied). The Department further explained

> that it has a significant interest in keeping the entire park open to all visitors during operating hours and that the decision not to allow nudity as part of your demonstration is a reasonable manner restriction. *You are of course free to conduct your activities, absent the nudity. You must wear the minimal amount of clothing in the Park as required by [Rule] 62D-2.014(7)(b).*" [*Id.* (emphasis supplied).]

2. *Plaintiffs' Complaint and Motion for Preliminary Injunction.* On February 12, 2003, two days before the planned event, Wyner and Simon filed a complaint against the state defendants in the District Court for the Southern District of Florida. The complaint alleged that the State's enforcement of rules precluding nudity in plays and demonstrations violates the First and Fourteenth Amendments of the Constitution, as enforced through 42 U.S.C. § 1983. JA 18-19.[2] Wyner and Simon sought declaratory and injunctive relief prohibiting interference with all expressive activities that include non-erotic displays of nude human bodies, including the February 14, 2003 nude peace symbol, as well as damages against Coulliette individually. *Id.* at 18-19.

Simultaneously, Wyner and Simon filed an Emergency Motion for Temporary Restraining Order And/Or Preliminary Injunction, seeking to prevent the Department and the Park "from requiring plaintiff Wyner and/or other participants, to wear clothing when they participate in a Valentine's Day protest in John D. MacArthur Beach State Park." JA 32. Plaintiffs argued that applying the Bathing Suit Rule to the February 14 demonstration unconstitutionally limited their freedom of expression in a public forum and that the Rule

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[2] Originally, the complaint contained a second count under the Florida Constitution. JA 19. After defendants moved to dismiss, plaintiffs voluntarily dismissed that count, which is not at issue before this Court. *Id.* at 3 (docket entries 13, 17).

was not content-neutral because it focused on *nude* conduct. *Id.* at 32-34.

On February 13, 2003, the day after the complaint was filed and less than 24 hours before the scheduled nude peace symbol, the district court held a hearing on the motion for a preliminary injunction. Counsel for the state defendants appeared only by telephone. JA 36. She objected to the plaintiffs' use and submission of exhibits that she had not been shown in advance. See, *e.g.*, *id.* at 55, 58. The court "overrule[d] the objection because of the time constraints of a preliminary injunction or temporary restraining order." *Id.* at 56.

The court heard live testimony from Wyner who recounted the history of her nude performances in the Park, see JA 45-60. She testified that the 1998 performance of her play occurred with a screen, but stated that after that 1998 performance,

> our conclusion after having done the play within the screen was that we had ghettoized the stage area and that the general public was in fear of coming beyond the so-called line in the sand and were in fear of coming beyond that line and the screen itself for fear of their being arrested . . . and so it actually chilled the performance, the screen, and *we let DEP know that we could no longer use the screen.* [*Id.* at 49 (emphasis supplied).]

The state witness testified by telephone. The court recognized that this witness's testimony was preliminary and rushed. See, *e.g.*, JA 84 ("I don't want to put too much weight on a fellow who got put on the spot kind of at the last minute").

Based on the stipulation settling the civil lawsuit that had permitted Wyner to perform her play in 1995 with the nudity screened and warning signs posted, the court asked why that would not "solve the problem" with respect to the nude peace

symbol. JA 86. The State's counsel responded that the Constitution does not require this accommodation, and that plaintiffs "have ample room for expression if they do their same demonstration just wearing some kind of minimal bathing suit." *Id.*

3. *The District Court's Rulings On The Motion for Preliminary Injunction.* The court first ruled orally that he was going to grant the preliminary injunction. JA 93. Assuming content neutrality for purposes of the preliminary injunction ruling, the court applied the Supreme Court's test for content-neutral restrictions on free expression in *United States* v. *O'Brien*, 391 U.S. 367 (1968). The court stated that "it does appear to me that there are alternatives that would be far less restrictive and could still meet the governmental interests," specifically the use of screens and signs akin to those used in the past. JA 94.

The court concluded: "[i]t bothers me, I think there are a lot of issues in this case, and *I don't like to try to decide[] issues on this quick a basis*, but I do feel like this meets the test of the injunction." JA 95 (emphasis supplied).

Later the same day, the court issued an Opinion and Order granting the motion. (The order was amended some weeks later to make non-substantive corrections. See Pet. App. 10a; JA 2.) The court made clear that it was applying the legal standard for a preliminary injunction. Pet. App. 13a-14a. The court initially stated that, assuming the restriction on nudity is unconstitutional, the public interest and the balance of harms would favor Wyner and Simon. *Id.* at 14a-15a. The court further noted that irreparable harm is established merely by the potential loss of First Amendment rights. *Id.* at 15a.

The court found that nude political speech is expressive conduct protected by the First Amendment, that the Park is a public forum, and that reasonable time, place and manner restrictions may be imposed on the exercise of First Amendment rights such as expressive nudity. Pet. App. 15a-

16a. As in its oral ruling, the court said that "[c]ontent neutrality is hereafter assumed only for purposes of this order." *Id.* at 17a.

Again applying the *O'Brien* test for assessing the constitutionality of content-neutral restrictions on free expression, the court held that the state laws at issue serve a significant government interest. Pet App. 17a-18a. But, the court believed that the record at the preliminary-injunction stage suggested that there were less restrictive alternatives to the nudity ban that would serve the State's interest, to wit, the screening and signage provisions of the 1995 stipulation resolving the civil litigation. *Id.* at 18a-19a. Based on this purported less restrictive alternative, the court decided that "[p]laintiffs have clearly satisfied the burden of persuasion of showing a likelihood of success on the merits of this case." *Id.* at 19a. The court emphasized that the State was authorized to put up screens and signs. *Id.* at 19a-20a.

The next morning the nude peace symbol production occurred without interference by the state defendants. "Plaintiffs and other participants [did] not remain[] behind the cloth screen during the nude peace symbol demonstration, and a fair reading of the record shows that Plaintiffs had no intention of remaining behind a cloth screen or other barriers during future nude expressive works." Pet. App. 4a; see also JA 108. In addition, the participants swam nude following the peace symbol display. See Defs. Opp. to Pls. Mot. for Summ. J. at 6 (Dec. 29, 2003) (citing Wyner Dep. 99).[3]

4. *The District Court's Grant of Summary Judgment and Final Judgment to Defendants.* The case proceeded to the adjudication of the merits of the complaint. After discovery, both parties filed motions for summary judgment.

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[3] A second grade class was unable to conduct its scheduled beach visit that day as a result of these activities. See JA 116; Defs. Opp. to Pls. Mot. for Summ. J. at 7 (citing Sands Dep. at 15, 18).

Plaintiffs' motion for summary judgment recited the text of the district court's opinion and order granting the preliminary injunction, and made the same legal arguments that had been made in support of the preliminary injunction. See Pls. Mot. and Mem. in Supp. of Mot. for Summ. J., (Dec. 8, 2003). In response, the state defendants argued that as of 2000, Wyner had declared that she would not comply with the less restrictive time, place and manner restrictions (the screening and signs) previously applied to her play because the screen was "'hugely chilling.'" See Defs. Opp. to Pls. Mot. for Summ. J., at 4 (citing TRO Tr. 20 ("we let DEP know that we could no longer use the screen") (JA 49), and Wyner Dep. 51-52). The state defendants also pointed to (i) Wyner's deposition testimony that she did not understand the purpose of the screen, *id.* at 6 (citing Wyner Dep. 42), (ii) another participant's testimony that Wyner and he "'decided to ignore the presence of the screen,'" *id.* (citing Schloss Dep. 22), and (iii) that fact that after the nude peace symbol was formed, all participants went into the water nude, *id.* (citing Wyner Dep. 99–100). Based on this evidence, the state defendants argued that the court's putative less restrictive alternative (the screens and signs) did not and could not serve the State's purposes.

The district court declined to decide whether the preliminary injunction prohibiting defendants from interfering with the February 14, 2003 demonstration had been properly issued, instead holding that the underlying legal claim had been mooted by the passage of time. Pet. App. 34a. But, the court held that, despite plaintiffs' temporary success, "[p]laintiffs are unable to show *actual* success on the merits." *Id.* at 35a (emphasis supplied). Applying the *O'Brien* test, the court found, contrary to its view in the order granting the preliminary injunction, that "a complete ban on nudity is necessary," and that there were no less restrictive means to achieve the State's important interests because "[p]ark authorities [are] unable to ensure that those engaged in the expressive conduct stay[] behind the screen." *Id.* at 42a

Moreover, the court held that, because "those engaged in expressive conduct at the park are free to continue with their conduct wearing thong bathing suits," "'any effect on the overall expression is de minimis." *Id.* (quoting *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 294 (2000)).[4]

The district court expressed its hope that plaintiffs would continue using the park, but "not in the nude," and entered final judgment for the state defendants. Pet. App. 46a; JA 145.[5]

5. *The District Court's Decision That Plaintiffs Are Nonetheless Prevailing Parties.* Despite its decision on the merits, the district court held that, because Wyner and Simon had obtained a preliminary injunction and performed the nude peace symbol on February 14, 2003, they were "prevailing parties." Opp. App. 2a-4a. The court rejected the defendants'

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[4] The court also held that Florida Administrative Code Rule 62D-2.014(18) (whose constitutionality was not addressed in the preliminary-injunction order) does not unconstitutionally restrict free expression, and rejected plaintiffs' claim against Coulliette individually. Pet. App. 43a-45a, 31a-32a.

[5] By the time the district court entered summary judgment for the state defendants, it erroneously believed that it granted the preliminary injunction based on its belief that defendants might not have been administering the minimum-clothing requirement in a content-neutral fashion. Pet. App. 47a n.2. As the court of appeals pointed out, however, the district court expressly assumed that the state had acted in a content-neutral manner for purposes of issuing the preliminary injunction. *See id.* 6a-7a n.4. Thus, in assessing whether the summary-judgment decision makes clear that the preliminary injunction was based on a legal or factual error, the relevant question is whether the preliminary injunction was based on a likelihood that the minimum-clothing requirement was unconstitutional because a less restrictive alternative (screens and signs) existed. The decision on summary judgment makes clear that the decision granting the preliminary injunction was erroneous and that the injunction would not have been granted had the law and facts been fully developed. *See infra* at Part II.A.

arguments that plaintiffs did not obtain relief on the merits and thus could not be prevailing parties. *Id.* at 3a-4a. The court awarded attorney's fees of $25,924.50 to plaintiffs for obtaining the preliminary injunction. *Id.* at 13a.

The Eleventh Circuit affirmed. The court found that the order granting the preliminary injunction was a ruling on the merits, and thus held that Wyner and Simon were prevailing parties entitled to attorney's fees under 42 U.S.C. § 1988. Pet. App. 2a-3a. The court explained that Wyner and Simon were prevailing parties because they "were able to show a substantial likelihood of success at the preliminary injunction stage, [although] they were unable to achieve actual success on the merits at the permanent injunction stage because of their intervening failure to abide by the less restrictive alternative." *Id.* at 7a-8a n.7. Like the district court, the appellate court declined to address the state defendants' challenge to the preliminary injunction, finding that the order was moot. *Id.* at 5a n.1.

The state defendants' petition for rehearing and rehearing en banc was denied. Pet. App. 49a.

SUMMARY OF ARGUMENT

In *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598, 604 (2001), this Court determined that a prevailing party is one who receives an "enforceable judgment[] on the merits" or a "court-ordered consent decree[]." These types of judgments "create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Id.* (quoting *Tex. State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)). Plaintiffs received a preliminary injunction, but did not prevail on the merits of their underlying legal claim. In fact, the preliminary-injunction order was followed by a decision on summary judgment that *rejected* the legal basis for that injunction. For reasons illustrated by this case, a plaintiff

should not be deemed a prevailing party if he or she obtains a preliminary injunction, but never receives a judgment on the merits, a court-ordered consent decree, or analogous relief that resolves the claim at issue.

First, under this Court's cases, a plaintiff who receives a preliminary injunction has not obtained a judgment on the "*merits*" or any "*material* alteration" in the "*legal relationship* of the parties." In the federal courts, the decision whether to grant a preliminary injunction involves consideration of the likelihood of success on the merits, the irreparable nature of potential harm, and the balance of public and private harms. The order involves only a *prediction* of success on the merits and a *temporary* barrier to a defendant's ability to enforce its laws. This does not change the parties' *legal relationship* and clearly does not resolve any claim. Indeed, the factual and legal analysis in a preliminary injunction order lacks preclusive effect and does not even establish law of the case. Moreover, as this case exemplifies, the proceedings on preliminary injunctions are often conducted in circumstances that deprive the defendant of a full opportunity to present its legal and factual defense on the merits. See *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 394-95 (1981). This Court's cases denying prevailing-party status to plaintiffs who obtain favorable interim orders addressing the merits strongly indicate that a preliminary injunction does not confer that status. See, *e.g.*, *Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987).

The courts of appeals' test for determining when a plaintiff who obtains a preliminary injunction is a prevailing party – which requires an analysis of whether the injunction preserves the status quo or is merits-based – is inconsistent with this Court's jurisprudence about the nature of preliminary injunctions and the effect of interim decisions on prevailing-party status. This imprecise test is also practically unworkable, producing wholly inconsistent results.

Second, even if there were circumstances in which a plaintiff could become a prevailing party simply by obtaining a preliminary injunction, those circumstances are not present here. A plaintiff who has obtained a preliminary injunction cannot be a prevailing party if the legal and factual underpinnings of that injunction are subsequently rejected on the merits. The trial court's summary-judgment decision rejected the bases for its initial preliminary-injunction order, and plaintiffs thus cannot be deemed prevailing parties based on that order.

Third, even assuming *arguendo* that the summary-judgment decision had not made clear that plaintiffs were unsuccessful, the preliminary injunction still could not confer prevailing-party status because any claim that the nudity ban was unconstitutional as applied to the February 14, 2003 demonstration became moot before it could be adjudicated on its merits. A claim that becomes moot before judgment on its merits cannot give rise to prevailing-party status, at least in circumstances where, as here, the case is not mooted by affirmative acts of the defendants. In this case, the state defendants vigorously disputed plaintiffs' claim that the nudity ban was unconstitutional as applied to the February 14, 2003 demonstration, but that claim was mooted by the passage of time. In this context, the preliminary injunction does not confer prevailing-party status.

Finally, it would not serve the purposes of the attorney's fees statute to confer prevailing-party status on respondents. The rules of law urged by petitioners will not discourage the filing of meritorious claims.

ARGUMENT

PLAINTIFFS ARE NOT PREVAILING PARTIES WITHIN THE MEANING OF 42 U.S.C. § 1988.

I. A PRELIMINARY INJUNCTION WITHOUT MORE CANNOT CONFER PREVAILING-PARTY STATUS.

A. A Preliminary Injunction Is Not An Adjudication On The Merits Or A Judicially-Enforced Resolution Of A Legal Claim.

1. In *Buckhannon*, this Court distilled from the attorney's fees statute and its cases a definition of prevailing-party status. This Court's review of its cases confirmed that a plaintiff is a prevailing party only if he has "'prevailed on the *merits* of at least some of his claims.'" 532 U.S. at 603. (quoting *Hanrahan* v. *Hampton*, 446 U.S. 754, 758 (1980) (emphasis supplied)). "At a minimum, the plaintiff must be able to point to a *resolution* of the dispute which changes the relationship between itself and the defendant." *Tex. State Teachers Ass'n*, 489 U.S. at 792 (emphasis supplied). See also *id.* ("[o]ur '[r]espect for ordinary language requires that a plaintiff receive at least some relief *on the merits* of his claim before he can be said to prevail'" (second alteration in original) (quoting *Hewitt*, 482 U.S. at 760) (emphasis supplied). Thus, an award of fees is appropriate "only in th[e] event that there [has] been a determination of the 'substantial rights of the parties,' which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney." *Hanrahan*, 446 U.S. at 758; *id.* at 757 (quoting H.R. Rep. No. 94-1558, at 8 (1976)).[6]

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[6] The phrase "substantial rights" is also relevant in harmless-error review. *See, e.g.*, 28 U.S.C. § 2111 (appellate courts are to disregard "errors or defects which do not affect the substantial rights of the

Based on this analysis, the Court identified two categories of prevailing parties: plaintiffs who receive judgment on the merits, and those who obtain a judicially-enforceable consent decree. See *Buckhannon*, 532 U.S. at 604 & n.7 (characterizing a consent decree as "entail[ing] judicial approval and oversight").[7] A party who obtains a preliminary injunction has *temporarily* prevented the defendant from enforcing its laws based, in part, on a *prediction* about the merits, but has not received judgment on the merits, a consent decree, or any other "'*material alteration* of the *legal relationship* of the parties,'" and thus has not prevailed. *Id.* (emphasis supplied) (quoting *Tex. State Teachers Ass'n*, 489 U.S. at 792-93).

Examination of this Court's cases involving plaintiffs who obtain interim orders addressing the merits reveals that such plaintiffs are not prevailing parties. In each case, the Court concluded that the plaintiff was not a prevailing party for reasons that are instructive here.

Most recently, in *Buckhannon*, the plaintiff residential care facility received a cease-and-desist order requiring it to close because of a violation of West Virginia's "self-preservation" law. The facility sued the state, seeking declaratory and injunctive relief, and obtained a stay, 532 U.S. at 600-01, "an interim order allowing Buckhannon to remain open without

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parties"). In that context, an error affects a defendant's substantial rights if it has "a prejudicial effect on the *outcome* of a judicial proceeding." *See United States* v. *Dominguez Benitez*, 542 U.S. 74, 81 (2004) (emphasis supplied). Similarly, in deciding whether a plaintiffs' substantial rights have been violated, which could make that plaintiff a prevailing party, a court should examine the proceeding's outcome. A preliminary injunction does not determine substantial rights because its legal and factual bases lack preclusive effect in the subsequent merits decision of the underlying claim. *See infra* at 21.

[7] In *Buckhannon*, this Court noted but did not decide the question whether a private settlement incorporated into the order of dismissal (not involved here) could also confer prevailing-party status. *See* 532 U.S. at 604 n.7.

changing the individual plaintiffs' housing and care" pending the outcome of the litigation. *Id.* at 621 (Ginsburg, J., dissenting). Subsequently, the state eliminated the "self-preservation" requirement and mooted the case. The facility sought attorney's fees.

Rejecting the "catalyst theory" for attorney's fees, this Court held that a plaintiff whose lawsuit causes a voluntary change in a defendant's conduct has not received the kind of judicial merits determination that confers prevailing-party status because such a plaintiff has not obtained a material alteration in the parties' legal relationship. See *id.* at 605 (voluntary behavioral change "lacks the necessary judicial *imprimatur*" to create prevailing-party status). While the Court did not expressly state that the interim stay – allowing the facility to continue operating during the litigation – was insufficient to make the facility a prevailing party, this is a logical implication of its decision. An interim judicial order such as a stay does not confer prevailing-party status, even if it has temporary, real-world consequences, because it does not determine the legal merits of the claim, resolve the claim through a judicially-enforced consent decree, or materially alter the parties' legal relationship. The rule should be the same for a preliminary injunction.[8]

Even leaving aside the stay, *Buckhannon*'s logic suggests that a plaintiff who receives only a preliminary injunction is not a prevailing party. *Buckhannon* held that a plaintiff who

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[8] The *Buckhannon* dissent would have deemed the facility a prevailing party *not* because it obtained a stay pending litigation, but because at the end of the day, Buckhannon's lawsuit caused the state to amend its laws, terminating the controversy between the parties and permanently giving the facility the real-world outcome it sought. *See* 532 U.S. at 624 (Ginsburg, J. dissenting). Nothing in the dissent's reasoning would support finding prevailing-party status based on a preliminary injunction providing *temporary* relief, especially where, as here, the state defended its law on the merits and ultimately prevailed. *See infra* at Part II.A.

does not receive a determination on the merits or other judicially-enforced relief resolving its claim is not a prevailing party even if the plaintiff's lawsuit causes a change in a defendants' conduct. A "catalyst" plaintiff obtains a *permanent* change in the defendant's conduct by persuading the defendant voluntarily to alter its conduct, yet this was deemed insufficient to confer prevailing-party status. A plaintiff who obtains a preliminary injunction has done even less. That plaintiff obtains only a *temporary* change in the defendant's conduct, a prediction of ultimate success on the merits (weighed with potential irreparable harm and the public interest) having no binding effect, and continuing litigation of the claim. If a catalyst plaintiff is not a prevailing party, surely a plaintiff who obtains a preliminary injunction is not.

Further, even before *Buckhannon*, this Court had held that interim judicial rulings that address but do not finally determine the merits of a plaintiff's claim do not confer prevailing-party status. In *Hewitt* v. *Helms*, 482 U.S. 755, Helms sued prison officials, alleging that they had violated his due process rights. In an interlocutory appeal, the court of appeals concluded that Helms's due process rights were violated and remanded with instructions to enter summary judgment for Helms unless the defendants established immunity. On remand, the district court granted judgment for defendants on grounds of immunity. Helms sought attorney's fees, which the appellate court authorized, finding that Helms was a prevailing party because the appellate holding that his constitutional rights were violated was a "form of judicial relief" akin to a declaratory judgment. See *id.* at 760.

This Court reversed. It held that treating the appellate court's legal holding as sufficient to confer prevailing-party status would "deprive[] the defendant of valid defenses to a declaratory judgment to which he is entitled." *Id.* at 762. Thus, *Hewitt* makes clear that a judicial ruling addressing some component of the merits that does not become an actual

judgment on the merits or other court-enforced resolution of the plaintiff's claim is *insufficient* to confer prevailing-party status. Like a stay and a quasi-declaratory judgment, a preliminary injunction is an example of an interlocutory ruling that addresses an aspect of, but does not determine, the merits of the plaintiffs' claim.

A judicial ruling cannot confer prevailing-party status simply by touching on the merits of the claim or temporarily preventing the state from enforcing its laws against a plaintiff. It must instead resolve a legal claim favorably for the plaintiff. "[L]iability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against . . . on the merits, § 1988 does not authorize a fee award against that defendant." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985). See also *Farrar* v. *Hobby*, 506 U.S. 103, 111 (1992). A preliminary injunction does not fulfill this requirement.

2. An examination of the legal characteristics and consequences of a preliminary injunction confirms that such an order is not a determination of the merits that results in prevailing-party status.

First, the inquiry that determines whether a plaintiff is entitled to a preliminary injunction is materially distinct from the inquiry that determines whether a plaintiff is entitled to judgment on the merits. "The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).[9] Thus, although likelihood of success on the merits is one factor that is considered, a decision to grant such interim

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[9] The Eleventh Circuit's test for issuing a preliminary injunction is in accord with this standard. *See, e.g., Burr & Forman* v. *Blair*, 470 F.3d 1019, 1031 n.32 (11th Cir. 2006).

relief is *not* "tantamount to [a] decision[] on the underlying merits." *Camenisch*, 451 U.S. at 394. As this case aptly demonstrates, a plaintiff who initially appears likely to succeed on the merits – based on the limited record available at the preliminary-injunction stage, see *infra* at 21-23 – may *not* succeed once the evidence is fully presented and considered. Accordingly, "it [is] improper[] [to] equate[] 'likelihood of success' with 'success.'" *Camenisch*, 451 U.S. at 394.

Courts of appeals routinely analyze preliminary-injunction factors on a sliding scale, so that a greater risk of irreparable injury justifies an injunction based on a lesser showing of possible success on the merits.[10] Indeed, this balancing of interests is inherent in the analysis of a preliminary injunction, and an injunction may issue with respect to claims with vastly different "likelihoods of success" depending upon the risk and type of irreparable injury. Moreover, courts often place a thumb on the judicial scale in favor of preliminary injunctive relief in cases (like this one) that involve the First Amendment, because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).[11] This balancing process is *not* a determination of a claim's actual merit.

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[10] *See, e.g., Fla. Med. Ass'n* v. *U.S. Dep't of Health, Educ. & Welfare*, 601 F.2d 199, 203 n.2 (5th Cir. 1979) ("a sliding scale can be employed, balancing the hardships associated with the issuance or denial of a preliminary injunction with the degree of likelihood of success on the merits"); *FoodComm Int'l* v. *Barry*, 328 F.3d 300, 303 (7th Cir. 2003) (same); *Serono Labs., Inc.* v. *Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998) (same); *Big Country Foods, Inc.* v. *Bd. of Educ. of Anchorage Sch. Dist.*, 868 F.2d 1085, 1088 (9th Cir. 1989) (same).

[11] In some circuits, "a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First

Second, the general rule is that a preliminary injunction lacks preclusive consequences, confirming that such an order is not a merits determination akin to a judgment on the merits or a court-enforced consent decree. "[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Camenisch*, 451 U.S. at 395; see also *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 681-82 (1951) (independent preliminary proceedings for interlocutory relief do not foreclose a later proceeding on the merits). Thus, the doctrines of res judicata, collateral estoppel, and law of the case do not apply to the factual and legal underpinings of a preliminary injunction. See, *e.g.*, *Adams* v. *City of Chicago*, 135 F.3d 1150, 1153 n.2 (7th Cir. 1998) (no collateral estoppel effect); 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4445 (2d ed. 2002) (no preclusive effect in other proceedings); *id.* at § 4478.5 ("[r]ulings – predictions – as to the likely outcome on the merits made for preliminary injunction purposes do not ordinarily establish the law of the case").

Third, a preliminary injunction does not confer prevailing-party status because it is the product of a truncated procedure. This Court has recognized that prevailing-party status should not be awarded unless the defendant had a full and fair opportunity to mount a defense. See *Graham*, 473 U.S. at 168 (declining to award fees in part because the defendant had not yet had an "opportunity to present a defense").

Hewitt, described *supra* at 18-19, illustrates this point. There, an appellate court ruled that Helms was a prevailing

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Amendment claim." *Sammartano* v. *First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002) (internal quotation marks omitted). *See also Chaplaincy of Full Gospel Churches* v. *England*, 454 F.3d 290, 301-04 (D.C. Cir. 2006) (describing circumstances in which a party alleging a violation of the First Amendment "per se satisfies the irreparable injury requirement of the preliminary injunction calculus").

party because it had found that Helms' constitutional rights were violated on interlocutory review. See 482 U.S. at 760. This Court nonetheless held that treating that interlocutory decision as a judgment on the merits would "deprive[] the defendant of valid defenses to a declaratory judgment to which he is entitled," including equitable defenses. *Id.* at 762. Under *Hewitt*, a defendant must receive a full opportunity to litigate the merits of a claim before a plaintiff is deemed a prevailing party.

That prerequisite is not satisfied in a preliminary-injunction proceeding because of the substantive and "significant procedural differences between preliminary and permanent injunctions." *Camenisch*, 451 U.S. at 394. "[T]he parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial decision based on the actual merits of the controversy." *Id.* at 396.

For all these reasons, the nature and legal consequences of a preliminary injunction demonstrate that a plaintiff who obtains such relief is not a prevailing party.

3. From this analysis, it logically follows that plaintiffs here are not prevailing parties. Plaintiffs received a preliminary injunction under the established standard for injunctive relief (Pet. App. 13a-14a), but did not receive a favorable ruling on the merits of their claim. The court did not decide the ultimate merits of the plaintiff's First Amendment claims until, on summary judgment, it rejected them. Indeed, it would have been inappropriate for the court to do so based on the limited proceedings that preceded entry of the preliminary injunction. See *Camenisch*, 451 U.S. at 395. Plaintiffs did not prevail.

The proceedings here also exemplify the limitations inherent in emergency proceedings. Plaintiffs filed their complaint and motion for a preliminary injunction two days before the February 14, 2003 nude peace symbol demonstration. JA 1.

The day before the demonstration, the district court held a hearing, at which counsel for petitioners participated only by telephone. *Id.* at 2, 36. The State's counsel objected to exhibits she had not reviewed and to the absence of a full context for letters that were admitted, but the court overruled those objections in light of the exigency of the matter. See *supra* at 7. The court noted repeatedly during the hearing that time constraints prevented a full hearing or analysis of the facts. See *supra* at 7-8. These concerns were borne out by events. Because of the expedited nature of the hearing, the state defendants were not prepared to present certain evidence or conduct cross-examination that became relevant (*e.g.*, evidence about whether the signs and screens that were proposed actually were a less restrictive alternative to the ban). In contrast, on summary judgment, the State presented its evidence and the court agreed that the screens and signs were *not* a less restrictive alternative to enforcement of the Bathing Suit Rule and entered judgment for the state defendants. Pet. App. 42a-43a.

Any fair reading of the transcript from the preliminary-injunction hearing and the contrasting treatment of the same issue at the summary-judgment stage demonstrates that interim relief was granted in this case after expedited proceedings with limited evidence, and that the state defendants lacked a full and fair opportunity to vet assumptions and present their defenses. This case thus illustrates why it is fundamentally unfair to treat plaintiffs as prevailing parties entitled to attorney's fees solely because they have obtained a preliminary injunction. See *Camenisch*, 451 U.S. at 395; *Hewitt*, 482 U.S. at 762.

B. A Legal Rule Classifying Some Preliminary Injunctions As Merits-Based And Thus Sufficient For "Prevailing Party" Status Is Inconsistent With This Court's Precedents And Unworkable.

1. Relying largely on the arguments made *supra*, the Fourth Circuit has adopted a bright-line rule that a plaintiff

who obtains only a preliminary injunction is not a prevailing party. See *Smyth ex rel. Smyth* v. *Rivero*, 282 F.3d 268, 277 (4th Cir. 2002). Other circuits, however, have concluded that some preliminary injunctions are sufficiently merits-based to confer prevailing-party status, and have attempted to distinguish such "merits-based" injunctions from "status quo injunctions" that do not confer prevailing-party status.

As explained *supra*, this Court's cases demonstrate that neither the fact that a preliminary injunction touches on the merits nor the fact that it has a temporary real-world effect (preventing the defendant from enforcing its law) is sufficient to confer prevailing-party status. Nor does the combination of these characteristics (a merits prediction plus a temporary change in conduct) overcome the deficiencies of each and amount to a "material alteration in the parties' legal relationship."

The difficulty with all efforts to distinguish preliminary injunctions that preserve the status quo from merits-based injunctions is that a "likelihood of success on the merits" is *not* actual success on the merits, and "the purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Camenisch*, 451 U.S. at 394-95. Accord 11A Charles Alan Wright, Arthur R. Miller & Mary Kate Kane, *Federal Practice and Procedure* § 2948 (2d ed. 1995).

In addition, measuring the degree to which an order granting a preliminary injunction rests on a merits assessment (as opposed to the assessment of harms and the public interest) is problematic:

> How much of a "likelihood of success" is enough? Will a 75 per cent likelihood do? How about 50 per cent with a strong public interest showing to boot? [A court has] to first collapse the standard four-factors test for granting preliminary injunctive relief into one factor – likelihood of success – and then equate likelihood of success with success in order to declare [a plaintiff a]

> "prevailing part[y]." [*Select Milk Producers, Inc.* v. *Johanns*, 400 F.3d 939, 957 (D.C. Cir. 2005) (Henderson, J., dissenting).]

Treating a judicial determination as if it were on the merits because it makes a *prediction* about the merits (based only on limited evidence) misses the mark.

Further, "[t]he concept *status quo* lacks sufficient stability to provide a satisfactory foundation for judicial reasoning." *Developments in the Law – Injunctions*, 78 Harv. L. Rev. 1055, 1058 (1965). Precisely what state of reality counts as the status quo can vary significantly depending on the moment the court identifies as "the last uncontested status which preceded the pending controversy." *Westinghouse Elec. Corp.* v. *Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958); see also 11A Wright, *supra* § 2948 ("[i]t is often difficult to determine what date is appropriate for fixing the status quo").

2. Even so, some courts attempt to conduct a case-by-case inquiry to determine whether a plaintiff who obtains an injunction is a prevailing party. These courts examine whether a preliminary injunction was granted principally to preserve the status quo or largely based on an assessment that plaintiffs were likely to succeed on the merits of their claims. For example, the Second and Sixth conduct "'close analysis of the decisional circumstances and reasoning underlying the grant of preliminary relief.'" *LaRouche* v. *Kezer*, 20 F.3d 68, 72 (2d Cir. 1994) (quoting *Webster* v. *Sowders*, 846 F.2d 1032, 1036 (6th Cir. 1998)). "[A]n unambiguous indication of probable success on the merits" would be sufficient to permit attorney's fees, whereas "merely a maintenance of the status quo ordered because the balance of equities greatly favors the plaintiff" would not. *Webster*, 846 F.2d at 1036. This test posits an inquiry into precisely how likely plaintiff was to prevail on the merits and how much of the balance of harms and the public interest affected the four-part balancing

process. In addition to being inconsistent with this Court's decisions, the test produces unpredictable results.

For example, in *LaRouche*, plaintiffs obtained a preliminary injunction allowing them to appear on a ballot as presidential candidates, but the Second Circuit denied them attorney's fees because the interim relief was a "procedural maintenance of the status quo" that did "not depend solely or even primarily on a consideration of the merits." 20 F.3d at 72 (internal quotation marks omitted). In contrast, in *Haley* v. *Pataki*, 106 F.3d 478 (2d Cir. 1997), plaintiffs were awarded a preliminary injunction preventing the Governor of New York from withholding pay from state employees, and the Second Circuit allowed fees because plaintiffs showed a "likelihood of success on their claim." See *id.* at 480. In both cases, the court was required to find a likelihood of success on the merits, and there is no way to discern from the courts' opinions why the *Haley* plaintiffs were more likely to succeed than the *LaRouche* plaintiffs, or why the preliminary injunction in *LaRouche* was more focused on the status quo than that in *Haley*.

In *Webster*, 846 F.2d at 1036-37, the Sixth Circuit rejected the district court's conclusion that the "'probability of plaintiffs' success in this action is very great'" as merely "making a record" through "rote recitation of one of the factors that must underlie . . . preliminary injunctive relief," and denied attorney's fees based on its belief that the district court had actually placed "greater emphasis [on] the threat of irreparable harm." *Id.* On the other hand, in *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1554, 1558 (11th Cir. 1987), the court of appeals stated, without explanation, that a preliminary injunction *was* based on the merits and entitled the plaintiff to fees, even though the district court's order was based on both irreparable injury (*i.e.*, the harm to the church from forbidding religious solicitation activity) and the likelihood of success on the merits (*i.e.*, the "well-established" rule "that religious solicitation is protected activity, and the threat of criminal prosecution effectively

chills that activity"). As the contrast between the views of the courts in these cases makes clear, it is extremely difficult to predict whether a preliminary injunction is deemed merits-based or intended to preserve the status quo.

This case further illustrates the difficulties in distinguishing status quo and merits-based injunctions. The judge appears to have believed that the preliminary injunction restored the parties to "the last uncontested status which preceded the pending controversy" – *i.e.*, Wyner was permitted to engage in nude expressive activities with a screen and signs. See, *e.g.*, Pet. App. 18a. This would suggest that the judge believed he was preserving the status quo. Moreover, the district court based the preliminary injunction in some substantial part on Wyner's claim of irreparable harm (which the Court presumed because the complaint alleged violations of First Amendment rights). *Id.* at 15a. The court also found a likelihood of success on the merits because of the putative less restrictive alternative, but the opinion is wholly unclear about the relative importance of the plaintiffs' showing of a likelihood of success. Indeed, the district court several times indicated its discomfort with the expedited proceeding and the difficulty of the issues, and ultimately rejected the bases of the preliminary injunction. See *supra* at 7-8.

In these circumstances, the district court should have concluded that the injunction was *not* merits-based. But it did not.[12]

3. Finally, efforts to distinguish status quo and merits-based injunctions are inconsistent with this Court's admonition that "[a] request for attorney's fees should not result in a second major litigation." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983). More satellite litigation is

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[12] The Eleventh Circuit simply stated without more that the injunction was merits based, so it is not possible to discern the basis for its conclusion. *See* Pet. App. 3a.

inevitable if a plaintiff can try to show prevailing-party status because the preliminary injunction was primarily "on the merits." And, as the current practice in some courts of appeals reveals, the process is "clearly not a formula for ready administrability." *Buckhannon*, 532 U.S. at 609-10 (internal quotation marks omitted). Instead, it will "ensur[e] that the fee application will spawn a second litigation of significant dimension." *Tex. State Teachers Ass'n*, 489 U.S. at 791.

In contrast, the bright-line approach suggested by *Camenisch* is clear: a preliminary injunction never amounts to a merits determination, because preliminary injunctions are intended to preserve the status quo pending a merits decision. It is excessively complicated to parse the reasoning behind each preliminary injunction to separate those that preserve the "status quo" (which is the ultimate purpose of *all* preliminary injunctions) from others based on the probable merits of the plaintiff's claim. Any legal rule encouraging such line-drawing should be rejected.

II. ASSUMING THAT CERTAIN PRELIMINARY INJUNCTIONS CAN SUPPORT PREVAILING-PARTY STATUS, THIS ONE CANNOT.

A. Plaintiffs Cannot Be Prevailing Parties Based On A Preliminary Injunction Whose Predicates Are Later Rejected On The Merits.

Even if this Court were to decide that certain preliminary injunctions can support prevailing-party status, and that a "merits-based injunction" was issued here, respondents are not prevailing parties. This Court should hold that a plaintiff who obtains a preliminary injunction is *never* entitled to fees when that temporary success rests on premises rejected in a subsequent decision on the merits of plaintiff's claims.

A defendant who has been "completely successful on all issues" is not required "to pay the unsuccessful plaintiff's

legal fees." *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 683 (1983).[13] And, a plaintiff is not entitled to prevailing-party status and attorney's fees based on a judgment that becomes moot before it is reviewed. See *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990) (a court order vacating a judgment on mootness grounds prevents a party from relying on that judgment for relief, and thus the party cannot "prevail" on its claim); see also *infra* Part II.B. Finally, as explained *supra* at 16-19, "a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a 'prevailing party.'" *Hewitt*, 482 U.S. at 763. These decisions lead to the conclusion that a plaintiff who obtains a preliminary injunction based on factual and legal determinations later *rejected* by the court in entering summary judgment for the defendant is not a prevailing party.

Every court of appeals that has considered the question has squarely held that a party may not recover attorney's fees for a preliminary injunction or, indeed, a favorable final judgment, that is reversed, dissolved, or undercut by a subsequent decision. "[W]hen a judgment on which an award of attorney's fees to the prevailing party is based is reversed, the award, of course, falls with it." *Palmer* v. *City of Chicago*, 806 F.2d 1316, 1320 (7th Cir. 1986). This is because "it is [not] possible to win by losing," and "[t]he civil

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[13] In civil rights litigation, attorneys' fees may sometimes be allowed *pendente lite*, before obtaining formal relief after judgment on the merits. Such interim awards, however, assume a final favorable adjudication or judicially-enforceable relief on the merits. Indeed, when attorney's fees have been awarded and paid on the basis of a judgment that is later reversed, the attorney must return the fees to the payor. *See, e.g.*, *Dale M. ex rel. Alice M.* v. *Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307*, 282 F.3d 984, 986 (7th Cir. 2002) (it is professional misconduct for an attorney "to hold on to a fee, obtained by a court order, to which she is not entitled because the order has been reversed").

rights attorney's fees statute does not reward a plaintiff who brings an unmeritorious suit." *Id.* at 1321, 1323.[14]

The Eleventh Circuit's decision is wholly inconsistent with the thrust of this authority. It accepted the district court's view that the preliminary injunction was granted on plaintiffs' claim that the State's prohibition on nudity was unconstitutional *as applied* to the February 14, 2003 demonstration, while summary judgment was granted on the purportedly different claim that the state's nudity ban was facially unconstitutional because it covered non-erotic nudity in expressive activity in the Park. Based on this division, the court below concluded that plaintiffs had prevailed on a claim. This was error.

The legal analysis that resulted in the court's determination that plaintiffs were entitled to a preliminary injunction (the application of the *O'Brien* test) was identical to the legal analysis that resulted in the court's summary-judgment decision. The latter decision rejected the same claim that underlay the preliminary-injunction motion – that the state

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[14] *See, e.g., Globe Newspaper Co.* v. *Beacon Hill Architectural Comm'n*, 100 F.3d 175, 195 (1st Cir. 1996) (when a judgment is reversed, "that party is no longer a 'prevailing party'"); *Clark* v. *Twp. of Falls*, 890 F.2d 625, 626 (3d Cir. 1989) (same); *Pressey* v. *Patterson*, 898 F.2d 1018, 1026 (5th Cir. 1990) (same); *Pottgen* v. *Mo. State High Sch. Activities Ass'n*, 103 F.3d 720, 723-24 (8th Cir. 1997) (same). *See also Smith* v. *Univ. of N.C.*, 632 F.2d 316, 352 (4th Cir. 1980) (applying this rule to a preliminary injunction later reversed); *Doe* v. *Busbee*, 684 F.2d 1375, 1381 (11th Cir. 1982) ("plaintiffs who have obtained a preliminary injunction but ultimately do not succeed on the merits may not be considered prevailing parties"); *NAACP* v. *Detroit Police Officers Ass'n*, 46 F.3d 528, 529-30 (6th Cir. 1995) (same); *Ward* v. *County of San Diego*, 791 F.2d 1329, 1334 (9th Cir. 1986) (same); *Dahlem by Dahlem* v. *Bd. of Educ. of Denver Pub. Sch.*, 901 F.2d 1508, 1512, 1514 (10th Cir. 1990) (plaintiff was not a "prevailing party" because the reversal of a companion case raising the same legal issues demonstrated that she would have lost on the merits).

law banning nudity in parks was unconstitutional as applied to non-erotic nudity in expressive conduct.

Specifically, the district court believed initially that there was a less restrictive alternative to enforcement of the Bathing Suit Rule, but subsequently concluded that there was not.[15] In addition, the court concluded initially that the Rule significantly restricted expression, but later found the restriction *de minimis*. Indeed, the court flatly stated that, although it appeared in February 2003 that there was a *likelihood* that respondents would eventually prevail on the merits, they were "unable to show *actual* success on the merits." Pet. App. 35a (emphasis supplied).[16]

For these reasons, if the Court concludes that some preliminary injunctions can support prevailing-party status, it should hold that a plaintiff is *not* a prevailing party where, as here, she obtains a preliminary injunction whose underpinnings are rejected in the subsequent adjudication of the merits of the litigation.

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[15] The preliminary injunction was, in fact, based largely on the inadequacy of the factual record and the state defendants' failure to anticipate that the district court might find a less restrictive alternative to a complete ban on nudity. Wyner testified at the February 13, 2003 hearing that she believed the use of the screen "ghettoized" nude expression, and that she had informed the Department that she could no longer use the screen. JA 49. But the district court plainly did not understand that Wyner and the others in the peace symbol would not abide by the cloth screen that constituted the "less restrictive alternative" authorized by the court. Once the court realized that fact, it determined *that* no less restrictive alternative existed. Pet. App. 41a-42a. The purposes of fee shifting statutes are not served by a rule that allows a party to prevail because the district court lacked a full picture of the facts or law.

[16] To be clear, the issue is not whether the injunction was an abuse of discretion and thus would have been vacated on appeal (an issue which became moot before it could be assessed), but instead whether the district court's subsequent merits decision rejects the findings that were the basis of the injunction.

B. Interim Orders That Are Mooted Prior To A Final Judgment Cannot Serve As The Basis For Attorney's Fees Under § 1988.

Even assuming that the preliminary injunction was unaffected by the subsequent summary-judgment ruling, plaintiffs here are not prevailing parties. The preliminary-injunction order was mooted by the passage of time once the February 14, 2003 demonstration ended, and was thus rendered unreviewable.[17] Granting attorney's fees on the basis of such a ruling contravenes this Court's teaching that an order mooted before a final judgment or consent decree does not confer prevailing-party status, particularly where the claim is not mooted by the defendant's affirmative acts.

As explained *supra* at 17, *Buckhannon* supports the contention that interim relief that is mooted prior to a final judgment cannot justify the shifting of attorney's fees. There, the interim stay of enforcement was mooted along with the rest of the lawsuit when the state voluntarily repealed the challenged statute. 532 U.S. at 601. This Court held that because the state's voluntary mooting of the lawsuit prevented the entry of a final judgment, it foreclosed any "corresponding alteration in the legal relationship of the parties," and the facility was ineligible for fees. *Id.* at 605. That the facility enjoyed the interim stay for over two years did not deter this Court from ruling that it was not a prevailing party. *Id.* Although the Court did not expressly address the effect of the stay's becoming moot, its holding suggests that where a case is mooted prior to final judgment, interim orders provide no basis for attorney's fees.

Although this Court has not yet expressly held that a preliminary injunction mooted before adjudication of the

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[17] *See* Pet. App. 5a n.1 ("[d]efendants' challenges to the underlying preliminary injunction are moot because the injunction was about a finite event that occurred and ended on a specific, past date").

underlying claim cannot confer prevailing-party status, it has determined that a plaintiff is not a prevailing party based on an interim order mooted before judgment through no affirmative act of the defendant. In *Lewis*, this Court held that "[a]n order vacating the judgment on grounds of mootness would deprive [a plaintiff] of its claim for attorney's fees under 42 U.S.C. § 1988 . . . because such fees are available only to a [prevailing] party." 494 U.S. at 480. In that case, the district court had granted summary judgment in favor of the plaintiff bank, which was challenging an allegedly unlawful state statute. During the pendency of the state defendant's appeal, however, Congress enacted a related provision that authorized the state law, thereby vitiating the bank's claims. *Id.* at 476-77. This Court held that, "[s]ince the judgment below is vacated on the basis of an event that mooted the controversy before the Court of Appeals' judgment issued, [the plaintiff] was not, at that stage, a 'prevailing party' as it must be to recover fees under § 1988." *Id.* at 483. See also *Rhodes* v. *Stewart*, 488 U.S. 1, 4 (1988) (rejecting attorneys fees under § 1988 because "[t]he case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever").[18]

The preliminary injunction at issue – which is the sole basis for the plaintiffs' assertion of prevailing-party status – was moot due to the passage of time before the district court could issue a final judgment on the merits of the underlying claim. Thus, it cannot be the predicate for attorney's fees under § 1988.

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[18] Because the issue was not briefed in the courts below, the *Lewis* Court declined to address "[w]hether [the plaintiff] can be deemed a 'prevailing party' in the District Court, even though its judgment was mooted *after* being rendered but before the losing party could challenge its validity on appeal." 494 U.S. at 483 (emphasis supplied). The resolution of that question has no bearing here because, as in *Buckhannon*, the injunction order was mooted *prior* to the trial court's final judgment.

Both the general rule barring attorney's fees with respect to orders mooted prior to final judgment and its application to this case make sense. *First*, interim orders like a stay or a preliminary injunction are inherently indeterminative of the ultimate outcome of a case. As demonstrated above, see *supra* at 19-22, this is especially so with respect to preliminary injunctions. See *Camenisch*, 451 U.S. at 395. This Court has declined to confer prevailing-party status on the basis of interlocutory rulings precisely because preliminary success does not guarantee that a party will ultimately prevail. See *Hanrahan*, 446 U.S. at 758 (despite an interlocutory ruling in favor of plaintiffs, "[t]he jury may or may not decide some or all of the issues in favor of [the plaintiffs]. If the jury should not [ultimately] do so . . . , it could not seriously be contended that the [plaintiffs] had prevailed"); *Hewitt*, 482 U.S. at 760 (interlocutory rulings are "not the stuff of which legal victories are made"). Because a finding of mootness prior to a final ruling forecloses further consideration of the mooted issue, *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920), a plaintiff cannot convert a preliminary merits assessment into a judgment on the merits sufficient to warrant prevailing-party status.

Second, the mootness of an interim order deprives defendants of the opportunity to convince the trial court or an appeals court to reverse its initial ruling. An order that is mooted should have no further legal effect because "the ends of justice exact that the judgment below should not be permitted to stand when, without any fault of the [petitioner], there is no power to review it upon the merits." *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916); see also *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) ("[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment"). Hence, vacatur of a mooted order is "commonly utilized . . . to

prevent a judgment, unreviewable because of mootness, from spawning *any* legal consequences." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 41 (1950) (emphasis supplied).[19] By virtue of its mootness, the specific application of state laws to the February 14, 2003 demonstration that formed the basis of the preliminary injunction could not be decided on its merits by the district court or the court of appeals. Accordingly, the state defendants should not have to bear any of its "legal consequences" – including attorney's fees based on an interim ruling related to that legal claim.[20]

III. NEITHER THE LEGISLATIVE HISTORY NOR THE PURPOSES OF § 1988 SUPPORT A FEE AWARD FOR A PLAINTIFF WHO OBTAINS ONLY A PRELIMINARY INJUNCTION.

This Court has considered the legislative history and the purposes of § 1988 in defining "prevailing party." See *Buckhannon*, 532 U.S. at 604. Neither supports an award of

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[19] The *Munsingwear* Court observed that

> [t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. [340 U.S. at 39.]

This rule is especially critical in the context of fees because a plaintiff who wins at the trial court, but loses on appeal, is not "prevailing." *See, e.g.*, *Clark*, 890 F.2d at 626-27.

[20] To be certain, vacatur may be inappropriate when it is sought by the party that caused the case to be mooted. *See U.S. Bancorp*, 513 U.S. at 24. But that is not what happened in this case. Here, the preliminary injunction was mooted by its own terms. *See* Pet. App. 5a n.1; *see also U.S. Bancorp*, 513 U.S. at 23 ("vacatur must be decreed for those judgments whose review is . . . prevented through happenstance – that is to say, where a controversy presented for review has become moot due to circumstances unattributable to any of the parties") (internal citations and quotation marks omitted).

attorney's fees to plaintiffs who obtained only a preliminary injunction based on claims whose merits were ultimately decided against them or, at best, were never decided through no fault of the defendants.

A. The Legislative History Of § 1988 Does Not Support Fee Awards To Plaintiffs Who Obtain Preliminary Injunctions And No Relief On The Merits.

In enacting § 1988, Congress intended to encourage *meritorious* civil rights suits and to discourage frivolous or vexation litigation. The Senate Judiciary Committee stated that "if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." S. Rep. No. 94-1011, at 2 (1976). See also H.R. Rep. No. 94-1558, at 1 (1976); *City of Riverside* v. *Rivera*, 477 U.S. 561, 578 (1986). At the same time, Congress actively sought to discourage suits that were "frivolous, vexatious, or brought for harassment purposes" by allowing courts to award fees to the *defendant* in such cases. S. Rep. No. 94-1011, at 5; see also H.R. Rep. No. 94-1558, at 7 (same).

Between these two poles lie cases in which the plaintiff has not obtained judicial vindication in the form of a judgment on the merits of a claim or a judicially-enforceable consent decree, but also has not pursued a frivolous suit to vex and harass the defendant. In such cases, the plaintiff is not required to pay the defendant's attorney's fees, and is not entitled to reimbursement of his or her fees. See, *e.g.*, S. Rep. No. 94-1011, at 5 (fee award to a defendant is "unjustified where a claim of racial discrimination, though meritless, was made in good faith").

Granting attorney's fees to a plaintiff who obtains a preliminary injunction but who does not receive a favorable judgment on the merits or any other judicially-enforced relief

resolving a claim does not serve the purposes Congress sought to achieve in enacting § 1988. An award of preliminary relief does not give rise to any factual or legal conclusion that is binding, let alone establish that the plaintiff has a meritorious claim under the civil rights laws. It reflects only some level of *likelihood* of future success on the merits (weighed with the possibility of future irreparable harm and the public interest), and "preserve[s] the relative positions of the parties until a trial on the merits can be held." *Camenisch*, 451 U.S. at 394-95. It is not, therefore, tantamount to a decision on the merits of a civil rights claim, as Congress required for a fee award. See *id.* at 394-95.

B. Declining To Award Attorney's Fees To Plaintiffs Who Obtain Only Preliminary Injunctions Does Not Undermine The Purposes Of § 1988.

The interpretation of attorney's fees statutes raises important policy considerations, as the three opinions in *Buckhannon* make clear. See 532 U.S. at 608-10; *id.* at 618-20 (Scalia, J., concurring); *id.* at 622-23, 638-40 (Ginsburg, J., dissenting). In particular, members of this Court have expressed concern that the term "prevailing party" not be interpreted in ways that "will deter plaintiffs with meritorious but expensive cases from bringing suit." *Id.* at 608. Denying prevailing-party status to plaintiffs here will not deter plaintiffs with meritorious claims from bringing suit.

A plaintiff with a meritorious claim generally does not bring a civil rights action to obtain only a preliminary injunction. Most plaintiffs (including those here) seek permanent prospective relief and damages. If they prevail on the merits of those claims, they are entitled to fees.

It does not discourage meritorious civil right suits to decline to award fees to a plaintiff who obtained a preliminary injunction but ultimately loses on the merits of his or her claims. And, it does not discourage meritorious civil rights suits to decline to award fees where the plaintiff received

some temporary respite from the defendant's enforcement of its laws, but does not receive a determination on the merits because the underlying claim was mooted by the passage of time or by the plaintiff's actions. Indeed, in *Buckhannon*, this Court held that a plaintiff was not a prevailing party even when the *defendant's voluntary conduct* mooted a plaintiff's claim before judgment.[21] See also *Select Milk*, 400 F.3d at 959 (Henderson, J., dissenting) (an "attempt to link the preliminary relief and the final relief [resulting from the defendant's voluntary change in conduct] sounds suspiciously

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[21] The only scenario in which declining to award fees for a preliminary injunction could conceivably discourage meritorious suits is where a plaintiff obtains an injunction and the defendant then voluntarily and permanently changes its conduct, terminating the litigation and mooting the plaintiffs' claim. The *Buckhannon* dissent feared that disallowing fees to such catalyst plaintiffs might "impede access to court for the less well heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general," 532 U.S. at 623 (Ginsburg, J., dissenting). But here, the plaintiffs' injunction effected only a temporary restraint on the state defendants' ability to enforce their laws; in the end, defendants' right to enforce their laws was vindicated. Nor did defendants impose upon plaintiffs the cost of testing their claims only to voluntarily moot the case when the preliminary injunction issued. The state defendants litigated the constitutionality of their laws to judgment. There is no indication in the legislative history that Congress sought to encourage civil rights suits of undetermined merit and no permanent consequence by awarding fees.

In any event, concern about a defendant's voluntary mooting behavior is significantly mitigated by the defendant's inability to moot a claim for damages and by the longstanding rule that voluntary cessation of unlawful conduct will not moot a claim unless "there is no reasonable expectation that the wrong will be repeated," which is a "heavy" burden. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (internal quotation marks omitted). This ameliorated the Court's concern about the denial of recovery based on the catalyst theory in *Buckhannon*. *See* 532 U.S. at 609 (citing *Friends of Earth, Inc.* v. *Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 189 (2000)).

like the 'catalyst theory' jettisoned by the *Buckhannon* Court").

Turning to Congress's other concern – that plaintiffs *not* receive fees for suits that ultimately lack merit – it is noteworthy that a rule that attorney's fees are not awarded for preliminary injunctions alone *does* discourage suits by plaintiffs with meritless claims and plaintiffs who do not intend to litigate their claims to judgment (but instead use the judicial system to harass the defendant or achieve short-term gains). As explained *supra*, often it is not difficult to obtain a preliminary injunction for claimed violations of civil rights, particularly where (as here) the claimed deprivation involves First Amendment freedoms. If a plaintiff could obtain attorney's fees for a preliminary injunction, plaintiffs with weak cases or vexatious purposes could put defendants to the expense and burden of a preliminary injunction and then attempt to moot or otherwise abandon the case, without ever having tested the actual merits of their claims. Congress did not intend to encourage such suits.

Moreover, allowing fees for preliminary injunctions that do not lead to judgments on the merits would create undesirable incentives for plaintiffs and defendants. A plaintiff may seek to file and obtain a preliminary injunction at the very last minute before a defendant can prepare its defense. A state or municipal defendant may be less likely to oppose a preliminary injunction, even if the defendant believes its position to be correct on the merits, for fear that it might have to pay a successful plaintiff's fees. The cost of this is not insignificant – in many cases, the defendant may agree not to enforce its valid laws pending litigation to avoid paying attorney's fees in its successful defense of those laws. Cf. *Buckhannon*, 532 U.S. at 608 ("the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct").

Finally, as noted *supra*, this Court has often stated that "'a request for attorney's fees should not result in a second major

litigation.'" *Buckhannon*, 532 U.S. at 609 (alteration omitted) (quoting *Hensley*, 461 U.S. at 437). The rules of law proposed by petitioners are bright line rules that do not require inquiry into whether a preliminary injunction is a "status quo" injunction or a "merits" injunction. See *supra* at 28.

At best, plaintiffs seek an award of attorney's fees "when the merits of [their] case remain unresolved." *Buckhannon*, 532 U.S. at 617 (Scalia, J., concurring). But "[o]ne does not prevail in a suit that is never determined." *Id.* at 620 (Scalia, J. concurring). "[O]rdinary conceptions of just returns reject the idea that a party who wrongly charges someone with violations of the law should be able to force that defendant to pay the costs of the wholly unsuccessful suit against it." *Ruckelshaus*, 463 U.S. at 685. There is no reason to shift fees in this case.

CONCLUSION

For these reasons, the decision of the Court of Appeals should be reversed.

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February 26, 2007